

Prorogation is a Paper Tiger, but Time is the Elephant

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There are 15 weeks left until the UK's (revised) scheduled departure from the EU on 31 October 2019. A new leader of the Conservative party, and so de facto Prime Minister, will be chosen by party members and presented to Parliament just before it plans to rise for summer recess on 25 July. When Parliament returns on 3 September, there will be just 8 weeks left to resolve the question which has plagued UK politics since the 2016 EU referendum: how, and on what terms, should the UK withdraw from the European Union?

The answers are limited, and unlikely to change with the new Prime Minister:

- Parliament may **ratify the Withdrawal Agreement**. This will trigger the withdrawal of the UK, and a transition period during which the UK will begin the next phase of negotiations on the future relationship with the EU;
- the government, either through exercise of its own prerogative power on matters of foreign affairs or following legislated direction by the Parliament, may **request a further extension** of Article 50 TEU. Any extension requires the unanimous consent of the remaining 27 EU Member States acting through the [European Council](#);
- the Parliament [may legislate](#) to **revoke Article 50 TEU**, directing government to withdraw notification of the UK's intention to leave the EU;

Both candidates for Conservative leadership have rejected these options, and aim to renegotiate the terms of the [Withdraw Agreement](#) in advance of October deadline. [Both](#) have [indicated](#) acceptance of 'No-deal' Brexit if they are fail to do so. On Brexit, a point of distinction between them is on the exercise of a power to prorogue Parliament in order to [ensure the UK's withdrawal](#) on 31 October 2019: Jeremy Hunt will not use the power, Boris Johnson [will not rule it out](#).

While this is possibly only politicking to win leadership, it has already spurred legal responses: Gina Miller, litigant in the [Miller case](#), is the latest to [threaten legal action](#). Sir John Major last week stated he [would seek a judicial review](#) of any attempt to prorogue Parliament in order to ensure Brexit in October. The threat of prorogation, if serious, could prove a catalyst for constitutional crisis.

Prorogation could be both Undemocratic and Unconstitutional

To [prorogue Parliament](#) means to formally end a parliamentary session, and Parliament is 'prorogued' (or suspended) until the next session begins. The power to prorogue is a prerogative one – a royal power exercised on the advice of

government – and, in simple terms, is where the Prime Minister advises the Queen to end the current parliamentary session who then exercises her power to do so. It is one of the few powers still exercised by the Crown, though in reality, dependent on the advice of the executive.

Suspending parliamentary debate would almost certainly result in the exit of the UK on 31 October 2019 on No-deal terms. Revocation [likely requires](#) Parliamentary legislation, while ratification of any agreement with the EU requires Parliamentary consent. There is no action that the remaining 27 EU Member States could take to prevent a No-deal Brexit: a request for further extension of the Article 50 process must come from the departing state. Prorogation suspends Parliament, removing power to legislate during that period.

While prorogation is a legal exercise of a prerogative power which belongs with government, for a Prime Minister to advise the Crown to prorogue with the express intent of thwarting any action by Parliament to prevent No-deal Brexit would, in opinion [shared](#) with [others](#) though [not all](#), both undemocratic and unconstitutional. Undemocratic by suspending Parliamentary debate to ensure with near certainty an outcome without democratic mandate; and unconstitutional by making Parliamentary power merely contingent on government, and not [sovereign](#) apart from it.

Would Prorogation mean a Constitutional Crisis?

With each [test of the UK constitution](#) since 2016, politicians and pundits have asked whether the UK is now suffering, or about to suffer, a constitutional crisis. As of yet, it is not.

The litmus test for what constitutes a constitutional [crisis](#) is when one institution (be it Parliament, the Courts, the Government or even the Crown) does not recognise the legitimate power of another causing an ongoing and critical state of legal uncertainty. Such prorogation of Parliament as endorsed by Johnson could be a catalyst for constitutional crisis; but is not – *of itself* – one. If government does not recognise the power of Parliament to direct its democratic will on matters of such constitutional importance such as Brexit and its objection to prorogation; or if parliamentarians do not recognise the power of government to prorogue (for example in carrying out the political threat made by former candidate for leader of the Conservatives, Rory Stewart, and convening an [alternative Parliament](#) were Johnson to prorogue the current one) – this *would* be a constitutional crisis.

The challenging issues faced by the Courts and the Crown in litigation on prorogation

A legal challenge would focus on the [legality](#) of the Prime Minister's advice to the Queen to prorogue parliament. The Queen's decision could not be subject to judicial review. It's plausible, though unlikely, that the High Court may consider the legality of the Prime Minister's advice to be nonjusticiable. It will also likely be asked

to consider an injunction to prevent the advice being actioned by the Queen – a constitutional quagmire in itself.

While there is little doubt a case, if admissible, would be expedited to reach the Supreme Court as quickly as possible, there is little time for consideration and argument: even the comparable *Miller* litigation on the question of triggering Article 50 TEU was nearly seven months from the launch of legal action to the delivery of the [Supreme Court judgment](#). A judgment ruling that the Prime Minister has acted unlawfully by advising the Queen to prorogue Parliament would be meaningless if it is handed down on 1 November 2019.

Beyond this, calling upon the Courts to adjudicate on prorogation brings the judiciary into an extremely polarised political dispute. In the *Miller* litigation, judges were publicly lambasted as ‘[enemies of the people](#)’ while answering questions on the rule of law and Parliamentary sovereignty. The same concerns relate to the Queen. As an institution, the Crown has not actively shaped law in centuries; and as a person, the Queen is resolutely apolitical. Calls for the Queen not to act on the advice of the Prime Minister and to refuse to prorogue Parliament require the Queen to make a decision with significant political and legal ramifications. Such an action would be unprecedented, even in a time without real precedent.

For there to be disagreement between legislature and the executive, or even with a judgment of the Courts, is not unusual and certainly not a precursor to crisis. However, current legal and political struggles over power could have a far more lasting and damaging impact on public perception and trust in the institutions of democratic governance and civil society. We have already seen deeply worrying evidence of this in increasing attacks on the legitimacy of [Parliament](#), and the demonisation of the [judiciary and justice system](#), as well as the castigation of [civil servants](#), [experts](#) and [academics](#).

The Elephant in the Room

There is one unavoidable certainty in Brexit: time. No vote in Parliament can prevent its passage, and there is no royal power to [change the date beyond on paper](#). Any decision as regards Brexit – from Parliament, Government, the Courts or even the Crown – must be made while meaningful action can be still be taken.

But the question of “what action?” shows no sign of resolution: as [evidenced by indicative voting](#), there is no apparent majority in Parliament for any alternative to no-deal, *except* to avoid it. The current minority government holds on with a paper-thin majority in Parliament (of only three votes) by relying on a [confidence and supply agreement](#) with Northern Ireland’s Democratic Unionist Party.

Ultimately the threat of prorogation is arguably a paper tiger: if a prime minister moved to prorogue Parliament, Parliament would likely call for a [vote of no confidence](#) in government in the time between the advice given and the power exercised. Such a vote could also be grounds even for the [Queen to refuse the advice of government](#). If the government loses confidence of the House of

Commons, this would result in the loss of Johnson's premiership and the power to prorogue.

With 15 weeks left, the only question is whether there will be enough time left for it to matter.

The article was also published today on the [LSE Brexit Blog](#).

